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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
	)	
Amendment of Section 73.202(b),	)	MB Docket No. 02-376
Table of Allotments,	)	RM-10617
FM Broadcast Stations	)	RM-10690
(Sells, Willcox, and Davis-Monthan	)	
Air Force Base, Arizona)	)	

To: Office of Secretary
Attn: Chief, Audio Division
Media Bureau

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PETITION FOR RECONSIDERATION

LAKESHORE MEDIA, L.L.C.

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January 10, 2005

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SUMMARY

Lakeshore Media, LLC ("Lakeshore"), licensee of Station KWCX-FM, Willcox, Arizona, petitions for reconsideration of the staff decision in this proceeding. The staff decision, while well intentioned, does not take into account the fact that unserved areas are calculated based on potential, not actual, service. As will be shown, the staff decision requires reconsideration so that a reasoned decision can consider the distinctions between potential and actual loss of service. In addition there are new circumstances to consider which will result in replacement of the loss of service.

Lakeshore's counterproposal requested the relocation of KWCX-FM from Willcox to Davis-Monthan Air Force Base, Arizona. Lakeshore's analysis indicated that the relocation would create "white" area, *i.e.*, area with no fulltime reception service. Accordingly, consistent with past procedure, Lakeshore proposed two new allotments which would provide service to the area. In a departure from past procedure, however, the staff stated that the creation of "white" area was fatal to the counterproposal, and the defect was not cured by the two additional allotments.

Lakeshore recognizes the importance of providing service to all parts of the country. However, it believes that the Commission should consistently apply its criteria to determine whether "white" area exists. Moreover, the direction the staff chose creates untenable distinctions between allotments based on inconsequential differences in timing, and calls into question longstanding Commission policy for gain-loss computations. Finally, in reversing existing policy without notice and applying new ad-hoc rules to unsuspecting parties, the staff ignored basic procedural fairness and exhibited a disregard for the industry and the public interest. Accordingly, Lakeshore's counterproposal should not have been denied.

TABLE OF CONTENTS

calculations take into account *potential* service. Therefore, the fact that there may be a delay in the introduction of service on a vacant allotment is simply not an issue. This is the central proposition that *Greenup* stands for. *Greenup* states that the Commission assumes a certain level of service from each allotment. That level of service may not ever be realized. But the Commission decided that the procedures set forth in *Greenup* strike the appropriate balance, and the Bureau is not free to ignore the Commission's determination.

II. Although the KWCX Relocation Involves Loss of Existing Service, That Loss is Evaluated Under Priority (4) and Cannot Overcome the Provision of a First Local Service Under Priority (3).

6. The second policy implicated by the relocation of the Willcox station is the loss of existing reception service. The *Report and Order* correctly recites the Commission's concern that the replacement of an operating station with a vacant allotment does not adequately cure the disruption in service caused by the loss of an operating station. *See Report and Order* at ¶ 9. However, in rejecting Lakeshore's counterproposal on this basis, the *Report and Order* completely ignores the Commission's priority system. Disruption in or loss of existing service where unserved areas are covered by potential service falls under priority (4), "other public interest matters." *See Nogales, Vail, and Patagonia, Arizona*, 16 FCC Rcd 20515, 20519 [¶ 9] (2001).[7] However, the relocation of KWCX-FM from Willcox to Davis-Monthan Air Force Base invokes priority (3), first local service. Lakeshore is unaware of a case in which the Commission has ever held that a priority (4) consideration outweighs a priority (3) benefit.

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[7] *See also Detroit Lakes and Barnesville, Minnesota and Enderlin, North Dakota*, 16 FCC Rcd 22581, 22584 [¶ 10] (2001), *aff'd in pertinent part*, 17 FCC Rcd 25055 (2002). In such cases, the Commission is careful to distinguish relocations that would leave unserved or underserved areas, because those losses invoke higher allotment priorities. However, as discussed above, when the proper methodology is used to compute gain and loss areas, the KWCX relocation does *not* leave any area with fewer than two reception services. This is consistent with other relocations the Commission has granted. *See, e.g., Scappoose and Tillamook, Oregon*, 15 FCC Rcd 10899 (2000); *Detroit Lakes and Barnesville, Minnesota, supra*; *Earle, Arkansas, et al.*, 10 FCC Rcd 8270 (1995).

facilities. *Id.* at 1495.[6] In other words, it is *potential* service, not actual service, that is used in "white" area calculations.

4. The *Report and Order* attempts, without argument, to distinguish *Greenup*, but its distinction is untenable. First, the *Report and Order* reads additional words into the *Greenup* decision that are not there. The *Report and Order* states that *Greenup* requires the Commission to "assume that service will be provided on previously allotted vacant channels." *Report and Order* at ¶ 9. But that is an overreading of the *Greenup* language. *Greenup* says the Commission should assume that service will be provided on "existing" vacant channels, but does not say that they must be "previously allotted." Following the peculiar logic of the *Report and Order*, Lakeshore's counterproposal would have been acceptable if the two Willcox allotments had been granted in a separate decision even one day earlier and therefore would, constitute "previously allotted channels." But that would make no sense at all. They are vacant channels in either case.

5. The *Report and Order* also states that the policy set forth in *Pacific Broadcasting of Missouri*, LLC, 18 FCC Rcd 2291 (2003), *recon. den.*, 19 FCC Rcd 120950 (2004) should apply here. *Report and Order* at ¶¶ 7, 9 But it cannot possibly apply. In that case, the Commission directed the staff to cease the practice of allotting a vacant channel to replace the loss of an existing local service. 18 FCC Rcd at 2296. The reason is that there is often a lengthy delay before service can commence on a vacant allotment, making a vacant allotment an inadequate substitute to replace the loss of an existing local service. *Id.* However, in the case of "white" area, the replacement of existing service is irrelevant *as a matter of law*. "White" area

[6] Although the actual language excludes Class A channels, the principle is the same but the maximum facilities may be limited to 3 kW ERP instead of 6 kW ERP by grandfathering provisions. The considerations for Class C stations are different because of the relative difficulty of achieving maximum facilities for that class. *Greenup*, 4 FCC Rcd at 3847 n. 12 (1989).

applying new ad-hoc rules to unsuspecting parties, the staff ignored basic procedural fairness and exhibited a disregard for the industry and the public interest. Accordingly, Lakeshore's counterproposal should not have been denied. The *Report and Order* should be reversed.

I. The KWCX Relocation Does Not Create "White" Area, Because Under Commission Law, "White" Area is Not Created, Despite a Lack of Actual Service, When Potential Service Exists.

3. There are two distinct policies that are implicated by the KWCX relocation. First, the Commission has a very strong policy against the creation of "white" area. The provision of a first fulltime aural service is the Commission's highest FM allocation priority.[5] Conversely, the removal of an area's only fulltime aural service is strongly disfavored, and cannot be overcome through lower-priority gains. However, Lakeshore's counterproposal does *not* create "white" area as that term is used in the FM allotment priorities. It is clear beyond argument that the Commission considers a vacant allotment to prevent the creation of "white" area. *Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991); *See also Banks, Sunriver, Redmond, and Corvallis, Oregon*, FCC 04-118 at ¶ 21 n. 28 (rel. May 27, 2004) (using maximum facilities for Class C0 station even though no application had been filed for such facilities). This is because, where "white" area is concerned, the Commission normally will "consider that service will be provided on existing vacant allotments." *Greenup*, 6 FCC Rcd at 1494. This principle is reinforced by the fact that for all but Class C allotments, the Commission considers service to be provided to the maximum of an allotment's class of channel, *regardless of the station's actual*

[5] *Revision of FM Assignment Policies and Procedures*, 90 F.C.C.2d 88 (1982). The allotment priorities are: (1) first fulltime aural service; (2) second fulltime aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3). *Id.*

1. Lakeshore's counterproposal requested the relocation of KWCX-FM from Willcox to Davis-Monthan Air Force Base, Arizona.[3] Lakeshore's analysis indicated that the relocation would create "white" area, *i.e.*, area with no fulltime reception service. Accordingly, Lakeshore proposed two new allotments, Channels 282C2 and 245C2 at Willcox, which would provide service to the area. This was consistent with past procedure. *See, e.g., Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580, 6584 n. 30 (1991) (the Commission looks favorably towards two new allotments replacing aural service lost in the relocation of station from Anniston to Sandy Springs);[4] *Caliente, Nevada, et al.*, DA 04-2146 (rel. Sept. 3, 2004) (proposed allotment at Grand Canyon Village, Arizona to avoid "gray" area). Lakeshore expressed an interest in both Willcox allotments.

2. The *Report and Order* denied Lakeshore's counterproposal. The staff stated that the creation of "white" area was fatal to the counterproposal, and the defect was not cured by the two additional allotments. Lakeshore recognizes the importance of providing service to all parts of the county. However, it does not believe the Commission is consistently applying its criteria to determine whether "white" area exists. As a legal matter, the staff confused two distinct policies: the policy against the creation of "white" area, and the policy against the removal of existing service. In its confusion, it muddled the analysis and came to the wrong conclusion. Moreover, the direction the staff chose creates untenable distinctions between allotments based on inconsequential differences in timing, and calls into question longstanding Commission policy for gain-loss computations. Finally, in reversing existing policy without notice and

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[3] Lakeshore also proposed to modify the transmitter site of KZZP(FM), Mesa, Arizona, with the licensee's consent. That proposal was subsequently amended to downgrade the class of KZZP, also with consent. *See* Lakeshore's Amendment to Counterproposal, filed October 26, 2004.

[4] The Sandy Springs proposal was denied, but not because of any white or grey area concerns. It was denied because its benefits under priority (4) did not outweigh the need for a rule waiver. *See id.*, 6 FCC Rcd at 6587.

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Air Force Base, Arizona)	)	

To: Office of Secretary
Attn: Chief, Audio Division
Media Bureau

PETITION FOR RECONSIDERATION

Lakeshore Media, LLC ("Lakeshore"), licensee of Station KWCX-FM, Willcox, Arizona, by its counsel, and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of the staff decision in the *Report and Order* in the above-captioned proceeding.[1] *See Report and Order*, DA 04-3514 (rel. Nov. 22, 2004).[2] The staff decision, while well intentioned, does not take into account the fact that unserved areas are calculated based on potential, not actual, service. Yet the *Report and Order* is concerned with the loss of actual service. As will be shown, the staff decision requires reconsideration so that a reasoned decision can consider the distinctions between potential and actual loss of service. In addition there are new circumstances to consider which will result in replacement of the loss of service. In support hereof, Lakeshore states as follows:

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[1] The caption in the *Report and Order* listed only the community of Sells, Arizona. However, Lakeshore's counterproposal involving two additional communities was accepted into the proceeding. *See Public Notice*, Report No. 2602 (April 3, 2003). The counterproposal was considered on the merits. Accordingly, the caption should include the two additional communities and the associated RM number.

[2] A summary of the *Report and Order* was published in the Federal Register on December 9, 2004. 69 Fed. Reg. 71386. Accordingly, this petition for reconsideration is timely. *See* 47 C.F.R. § 1.429(d).

Certainly there is no language in the *Report and Order* indicating that the Commission was breaking new ground by doing so here. Rather, it is clear that the Commission confused the "white" area considerations under priority (1) with the disruption in service under priority (4) and, as a result, did not reach the correct conclusion.

III. The Report and Order Would Create Gaping Holes in Allotment Policy Which Have No Clear Way of Being Filled.

7. By failing to recognize the fact that gain-loss calculations take potential service into account, the *Report and Order* raises many more questions than it answers. If concurrently allotted channels are not counted for "white" area purposes, then which "previously allotted" channels count? Must the allotment have occurred one year earlier, two years earlier or just earlier? Do concurrently allotted *upgrades* for an existing station count since they are not vacant allotments? That is, suppose the loss area in this case had been replaced by an existing station receiving an upgrade in class as part of the same rule making proposal. Would the proposal then have been denied? Would it make a difference if the station were unbuilt? According to the staff's stated rationale, it should matter, because an existing station can promptly apply for and construct upgraded facilities, without the lengthy auction and permitting delays associated with a vacant allotment. Thus, following the reasoning of the *Report and Order*, Lakeshore could have covered the "white" area by proposing an upgrade in class for an existing station, but not an upgrade in class for an existing but vacant allotment (unless a construction permit had already been granted for the vacant allotment). Is this where the Commission is drawing the line? If so, the Commission should consider the fact that a vacant channel can be auctioned, authorized and constructed in less than the 3-year period some permittees take to construct new facilities.

8. Similarly, if an existing station had been granted a one-step upgrade in class which covered the "white" area in this case, would the proposal still have been denied? Again,

according to the rationale in *Sells*, such a procedure should be permissible because it would avoid any disruption in service – a licensee can promptly construct the upgraded facilities and commence operation. However, even if the Commission is willing to draw such fine lines in allotment proceedings (which it should not), still more questions would be raised. Assuming that the "white" area in this case had been covered by an upgrade to an existing station – either made in connection with the rule making proposal or separately applied for as a one-step upgrade – would the facilities authorized thereby have to be constructed to constitute a replacement service to unserved areas?

9. What if the station leaving behind an unserved loss area is an *unbuilt* station? Commission policy will permit an unbuilt station to change its community of license even when it is the community's only local service because it will not deprive the community of existing service. *See, e.g., See Chatom and Grove Hill, Alabama*, 12 FCC Rcd 7664 (1997). But what if the move created "white" area? Both situations would involve only potential service. Would the Commission then permit a vacant allotment to "backfill" the removal of an unbuilt station?

10. The *Report and Order* does make clear that the staff does not want to have existing service taken away from unserved listeners for an extended period of time. But any distinction the staff may wish to draw between newly allotted channels, previously allotted channels, or upgrades to existing stations cannot withstand scrutiny, because there is no way to determine whether a newly allotted channel will take longer to commence service than an unbuilt station or a minor modification to an existing station, given the three-year construction deadline on such modifications. One possible conclusion the staff could reach is that unserved areas are created when existing service is taken away, and service is reestablished when new service commences. However, adopting this policy would immediately create numerous unserved

"white" areas and underserved "gray" areas that do not currently exist because they are within the potential service areas of vacant allotments or unconstructed permits.[8]

11. Finally, if vacant allotments are no longer counted for "white" area purposes, as the *Report and Order* holds, then the Commission's longstanding procedures for computing gain and loss areas are called into question, since the same methodology used to determine "white" areas is also used to determine loss areas. Indeed, following the *Report and Order*, vacant allotments and unconstructed permits would not be taken account in the gain-loss analysis. This would mean that virtually every allotment case involving a loss area is open to review and reconsideration on the basis of its gain-loss analysis.

IV. The Staff Should Not Make New Policy on an Ad Hoc Basis Because Doing So is Contrary to Administrative Procedure, is Unfair to Parties Before the Commission, and Leads to Bad Decisions.

12. As discussed above, the Bureau has previously sanctioned the use of vacant allotments to prevent the creation of "white" or "gray" area in allotment cases. *See Eatonton and Sandy Springs, Georgia* and *Caliente, Nevada, supra*. The *Report and Order* reversed this settled precedent, without having raised the issue. Proceeding in this way is troubling in three respects. First, it violates basic administrative procedure. An agency undertaking to change its interpretation must afford the public adequate notice and an opportunity to comment. *National Family Planning and Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992). The Bureau did not do so here. True, this was a rule making proceeding conducted under the informal rule making provisions of the Administrative Procedure Act. *See* 5 U.S.C. § 553. However, the Bureau gave no notice that it intended to address this particular rule in this

[8] Moreover, the Commission currently treats all existing stations other than Class C stations as having maximum facilities for their class, even when they are operating with lower class facilities. *Greenup, supra*, 6 FCC Rcd 1493 (1991). If, to the contrary, actual service rather than potential service is

proceeding, which it must do in order to satisfy its procedural obligations. *See Chemical Waste Management v. EPA*, 976 F.2d 2, 33 (D.C. Cir. 1992). *See also* 5 U.S.C. § 553(c).

13. Second, making law on an ad hoc basis is unfair to the parties before the Commission. The *Report and Order* applied the new policy to the parties in this case, who had acted in good faith on the application of existing case law. Thus, the Bureau applied its new rule interpretation not merely prospectively (*i.e.*, to future cases), but retroactively to the parties before it as well. While the Bureau may be entitled to engage in retroactive rule making given appropriate circumstances, it is an absolute requirement that it must make an affirmative finding on the record that the retroactive application of such a rule is appropriate. *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C. Cir. 1986). It made no such finding here.

14. There is no reason why Lakeshore should not be entitled to have its counterproposal considered under the rules in effect when it was filed. Lakeshore made its decision and invested funds in reliance on the Commission's established allotment rules and procedures. The *Report and Order* does not explain why the public interest demands that the Bureau's new interpretation must be implemented immediately to the substantial detriment of a private party who reasonably relied on settled precedent. The Bureau could have proceeded in a prospective manner – providing interested parties with an opportunity to comment on the Bureau's new interpretation and whether there might be another way to resolve the issue it raised on its own initiative. But the way it has chosen sows confusion and discourages private investment. The *Report and Order* conveys the impression that the Bureau has no respect for the rule of law and that it is willing to act in an arbitrary fashion without regard to the equities of parties who have relied on its prior pronouncements. It is difficult to understand how this

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used in "white" area and loss area computations, the increase in existing "white" areas would be significantly more pronounced.

approach can serve the public interest. The Bureau has a troubling history of proceeding in just such an arbitrary manner, and seems not to be able to learn from its mistakes.[9]

15. The third reason that the Bureau should not make new policy on an ad hoc basis, without the benefit of notice and comment, is that it leads to bad decisionmaking. This has clearly happened in this case. As discussed above, the policy announced in the *Report and Order* draws an untenable distinction between an allotment made in the context of an allocations proceeding and a previously allotted channel. It also raises many unresolved questions regarding the implementation of the new policy in other contexts – in particular, with respect to gain-loss and "white" area computations. It fails to recognize that potential service, not actual service, has for many years been used to satisfy the requirement of service to unserved areas. These problems could easily have been avoided if the Bureau had proceeded with the benefit of informed comment from the interested public. In that regard there, is a pending proceeding in which the Commission could consider this issue in a manner that answers the many questions raised and provides guidance to parties that wish to offer a proposal.[10] That proceeding would be proper forum to make such a policy change.

V. The "White" Area In This Case Can Be Covered By a One-Step Upgrade to an Existing Allotment.

16. When its counterproposal was filed on January 30, 2003, Lakeshore submitted an engineering exhibit detailing the remaining services that covered the KWCX-FM loss area. The information contained in that exhibit is outdated. Thus, pursuant to Sections 1.429(b)(1)-(3) of the Commission's Rules, Lakeshore is submitting an updated engineering exhibit (attached). This exhibit demonstrates that the number of stations covering the KWCX-FM loss area has

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[9] *See, e.g., Gunnison, Colorado, et al.*, 19 FCC Rcd 18542 (2004), *pet. for recon. pending.*

changed since Lakeshore filed its counterproposal. Specifically, Station KCDQ(FM), Tombstone, Arizona, filed an application, which was amended on January 28, 2004. This amended application will, when granted, cover a significant portion of the KWCX-FM loss area, including most of the "white" area. *See* BPH-20010525AAX. The small area left unserved contains only 40 people, and should be considered de minimis. *See Seabrook, Texas, et al.*, 10 FCC Rcd 9360 (1995). The amended KCDQ(FM) application was filed to implement the facilities authorized in MB Docket No. 02-374, which modified the authorization of KCDQ(FM) to specify Tombstone, Arizona as the community of license. Because this amended application is a cut-off minor change in facilities, the Commission should consider it to be a "singleton" application and when granted it will provide service to most of the unserved area indicated in Exhibit E, Figure 5.

17. More importantly, however, on December 1, 2004, Cochise Broadcasting LLC ("Cochise") filed an application to provide a new FM service on Channel 279C at Lordsburg, New Mexico. *See* BNPH-20041201CAN. This new station was awarded to Cochise as the high bidder in FM Auction 37, and thus, the application by definition is a "singleton." When this application is granted it will also cover a significant portion of the KWCX-FM loss area, including *all* of the "white" area. Therefore, once both the KCDQ(FM) application and the Cochise application are granted, all of the "white" area and most of the "gray" area in the KWCX-FM loss area will be covered by existing service.[11] The fact that this proposal would create a small amount of "gray" area is not fatal to the proposal, since priorities (2) and (3) are

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[10] In the Matter of the Commission's Rules Regarding Modification of FM and AM Authorizations, RM-10960, Pub. Notice, Report No. 2657 (rel. April 22, 2004).

[11] In addition, AM Stations KHIL, Willcox, Arizona, and KAPR, Douglas, Arizona provide service to the entire KWCX-FM loss area with their daytime signals.

co-equal. *See Littlefield, Wolfforth and Tahoka, Texas*, 12 FCC Rcd 12 FCC Rcd 3215 (1997); *Meeker and Craig, Colorado*, 15 FCC Rcd 23858 (2000).

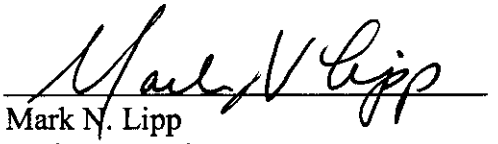
18. Because the "white" area situation has changed, Lakeshore is entitled to have its counterproposal reconsidered under the standard set forth in *Greenup, supra*. In that case, a proposal which originally claimed benefits under priority (2) was reversed on reconsideration because intervening changes had removed the priority (2) gains. *See* Greenup, 6 FCC Rcd at 1494 [¶ 9]. This case stands in the same procedural posture. Here, to the extent there was a priority (1) bar to the relocation of KWCX-FM, that bar has been removed by the intervening changes at Tombstone, Arizona and Lordsburg, New Mexico.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission should reconsider the *Report and Order*. It should consider Lakeshore's counterproposal on its merits. It would provide a first local service to Davis-Monthan Air Force Base (pop. 6,898) and would provide new radio service to nearly 800,000 people without creating any unserved areas. The Commission should grant the counterproposal.

Respectfully submitted,

LAKESHORE MEDIA, L.L.C.

By: 

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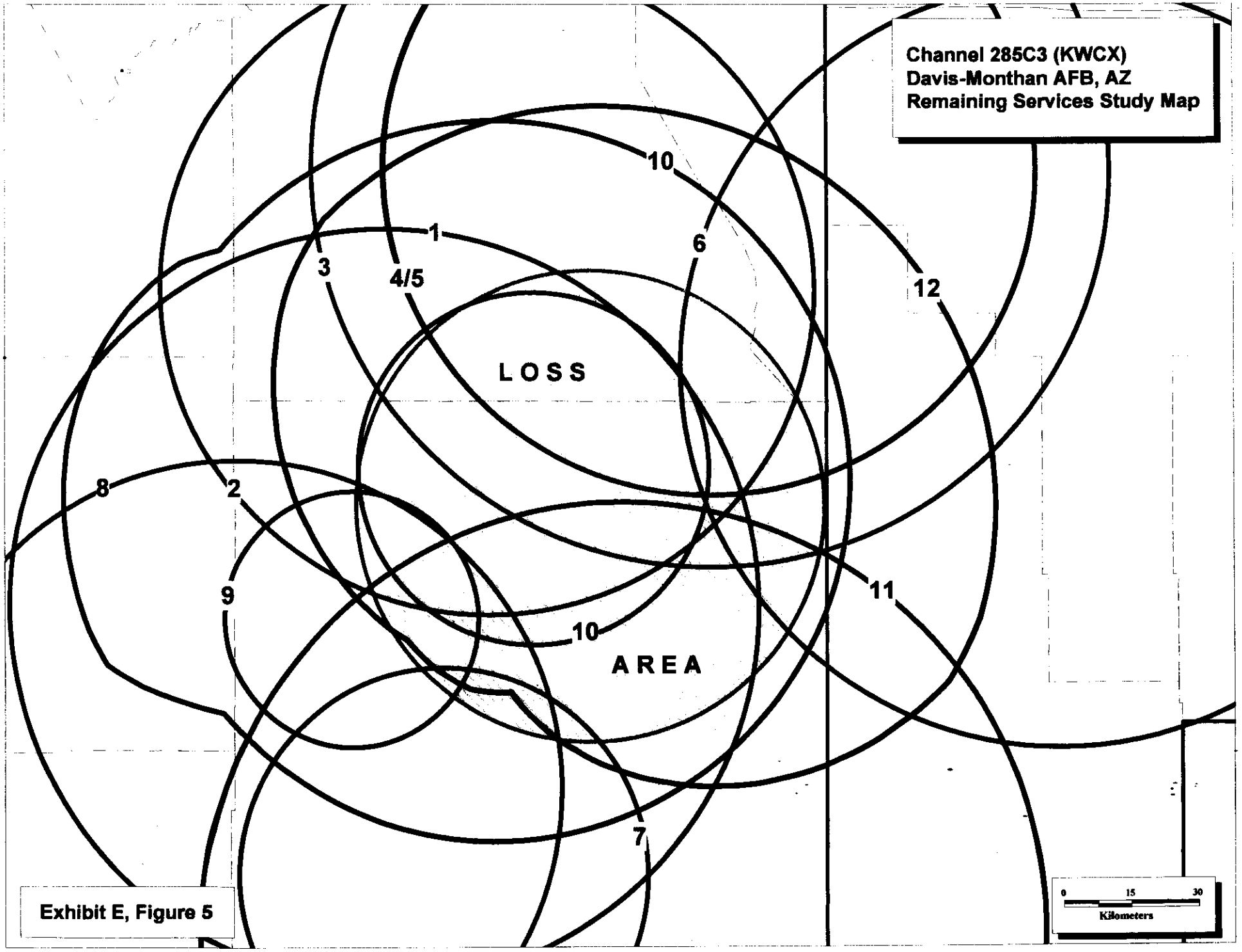
Channel 285C3 (KWCX)
Davis-Monthan AFB, AZ
Remaining Services Study Map
10
1
3
4/5
6
12
LOSS
8
2
9
11
10
AREA
7
Exhibit E, Figure 5
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15
30
Kilometers

Engineering Statement

In Support a
Counterproposal

MB Docket 02-376, RM-10617 (DA 02-3361)

Channel 285C3 (KWCX), Davis-Monthan Air Force Base, Arizona

List of Facilities in the KWCX Remaining Services Study

Number	Facility	Channel	City, State
1	KCDQ (application)	237C0	Tombstone, AZ
2	KXKQ	231C1	Safford, AZ
3	KFMM	256C	Thatcher, AZ
4	KSAF	264C1	Duncan, AZ
5	KWRQ	272C1	Clifton, AZ
6	KPSA	250C	Lordsburg, NM
7	KWRB	215C2	Sierra Vista, AZ
8	KKYZ	269C1	Sierra Vista, AZ
9	KAVV	249A	Benson, AZ
10	KHIL(AM) (daytime)	1250 kHz	Willcox, AZ
11	KAPR(AM) (daytime)	930 kHz	Douglas, AZ
12	AP279C (application)	279C	Lordsburg, NM

Exhibit E, Figure 6

CERTIFICATE OF SERVICE

I, Lisa Holland, hereby certify that on this 10th day of January, 2005, copies of the foregoing "Petition for Reconsideration" were sent via first-class mail, postage prepaid, to the following:

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